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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. B-1 to B-3) is reported at 585 F. 2d 1303. The panel opinion (Pet. App. A-1 to A-9) is reported at 566 F. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1978. A petition for rehearing was denied on January 10, 1979. The petition for a writ of certiorari was filed on February 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether post-arrest statements made by petitioner to an Assistant United States Attorney at a conference initiated by petitioner were inadmissible under Fed. R.

Crim. P. 11(e)(6), which bars the introduction of statements made in the course of plea negotiations.

2. Whether petitioner's statements were inadmissible on rebuttal because the Assistant United States Attorney had told petitioner that this case would not be discussed at the conference.

RULE INVOLVED

Rule 11(e)(6), Fed. R. Crim. P., provides:

> Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

STATEMENT

On retrial[1] before a jury in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import marihuana, importation of marihuana, and possession of 977 pounds of marihuana with intent to distribute it, in violation of 21 U.S.C. 952(a) and 841(a)(1). He was sentenced to concurrent terms of imprisonment for three years and a three-year special parole term. A divided panel of the court of appeals reversed petitioner's conviction. 566 F. 2d 1227 (Pet. App.). Thereafter, the Fifth Circuit reheard the case en banc and affirmed the conviction. 585 F. 2d 1303 (Pet. App. B-1 to B-3).

1. The evidence at trial showed that in September 1972 petitioner was a partner with one Pedro Alvarez in a stereo sales and installation business in Tampa, Florida (Tr. 61-62). At that time petitioner became acquainted with William Randy Kilgore, who had been employed in Alvarez's marihuana importation operation (Tr. 63-65). Petitioner and Kilgore subsequently agreed to engage in a marihuana importation venture without Alvarez. During the ensuing few weeks several others were recruited for the undertaking, numerous planning meetings were conducted, and petitioner traveled to Colombia, where he negotiated with Alvarez's own source.

Among the recruits to the venture was David Butler, a government informant who was assigned by the conspirators to pilot the airplane that would be used for the round trip journey to Colombia to pick up the marihuana. Butler participated in the planning meetings with the conspirators during October and November of 1972 and selected an area known as Lehigh Acres as the return landing site. On one occasion petitioner and two others drove to Lehigh Acres to inspect the location (Tr. 330-332).

On the morning of November 26, 1972, Butler flew his plane to Colombia, carrying petitioner and another co-conspirator as passengers. They obtained a load of marihuana and returned to Lehigh Acres that same evening. Customs officials, who had been maintaining surveillance of Lehigh Acres, arrested some of the

[1] Petitioner was originally convicted in 1973, and the court of appeals affirmed *sub nom. United States* v. *Fink*, 502 F. 2d 1 (5th Cir. 1974). This Court reversed, holding that it was error for the district court to deny counsel access to petitioner during an overnight recess that had interrupted petitioner's direct testimony. *Geders* v. *United States*, 425 U.S. 80 (1976).

conspirators there after the delivery of the marihuana had been completed. By the next day all the conspirators, including petitioner, were in custody (Pet. App. A-3).

2. Petitioner's defense at trial was entrapment. He admitted traveling with various alleged co-conspirators to places in Florida where planning meetings took place. He claimed, however, that his sole purpose in traveling to these places was pleasure; he denied that he had participated actively in the meetings (Tr. 651-654, 655, 669-670). Petitioner claimed that he agreed to join the conspiracy only after continuous urging by Butler (Tr. 673-675).

3. In advancing his defense of entrapment, petitioner testified that he had never sold illegal drugs or used drugs other than marihuana, and that he had used marihuana only infrequently (Tr. 698-702). On cross-examination, petitioner was asked about a Porsche automobile titled to him but used by Pedro Alvarez. He gave an explanation in which he denied telling anyone that the purpose of this arrangement was to conceal Alvarez's affluence from the Internal Revenue Service (Tr. 929-930). In addition, he was asked about being a courier of money to New York for Alvarez's drug operation. He admitted that he had done so, but he insisted that that incident had occurred in December 1972, a month after the offense with which he was charged (Tr. 930-931). Later in the trial, three government rebuttal witnesses—two co-conspirators and a former Assistant United States Attorney—all testified that petitioner had told them that the purpose of titling the Porsche in his name was to conceal its true ownership from the Internal Revenue Service (Tr. 977-978, 1030-1031, 1041). Furthermore, each of these rebuttal witnesses stated to the jury that petitioner had admitted transporting small bills to New York City for Alvarez, converting them into large bills, and giving the large bills to Alvarez upon returning to Tampa. They said he had further stated that that incident occurred prior to the events for which he

was on trial (Tr. 978-979, 1031-1032, 1042). The court instructed the jury that it could consider the testimony concerning the Porsche only as it bore on petitioner's credibility (Tr. 979-980) and that it could consider the testimony concerning the New York City trips only as it bore on his predisposition (Tr. 1245).[2]

4. The circumstances under which the Assistant United States Attorney obtained the statements from petitioner that were introduced on rebuttal may be summarized as follows. Prior to trial, but several months after his arrest, petitioner telephoned customs agent Lowell Miller and said that he wanted to reveal some information about Alvarez. Petitioner then went to Miller's office, where they chatted for a brief period, following which they went to the office of Assistant United States Attorney Oscar Blasingame (Tr. 760-761, 769).

At the outset of the meeting Blasingame administered a full *Miranda* warning to petitioner and set forth as ground rules that the purpose of the meeting was to discuss Alvarez; that petitioner understood that he had come voluntarily; and that the pending case against petitioner would not be discussed (Tr. 739, 746-747).[3] Blasingame asked whether petitioner wanted his attorney or another lawyer present, and petitioner replied that he did not (Tr. 739-740). In fact, petitioner insisted that his

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[2]Specifically, the court instructed the jury that this evidence was admissible on the issue of predisposition only if the jury determined that the travel to New York had occurred before the date of the offense in question. The jury was told that if it determined otherwise, it should disregard the evidence (Tr. 1254).

[3]At the time of this conference Blasingame knew that petitioner's pending trial did not involve Alvarez; thus, he felt that a discussion regarding Alvarez would not reveal anything relevant to petitioner's case. When asked by the court whether he planned to use the information obtained from this conference against petitioner "in this case," Blasingame replied, "No, Your Honor, we had no idea that we would get into this Pedro Alvarez business in the trial" (Tr. 743).

own attorney not be told about the meeting because the attorney had previously represented Alvarez (Tr. 739-740, 759-760). Petitioner and Blasingame then proceeded to discuss Alvarez; in the course of the discussion, petitioner made the statements that Blasingame related as a rebuttal witness at trial, including the statement that he had permitted Alvarez to register his Porsche in petitioner's name although it had been purchased by Alvarez, and the statement that he had traveled to New York City on Alvarez's behalf to exchange small bills for large ones (Tr. 1038-1042).

ARGUMENT

Petitioner argues that the trial judge erred in permitting Assistant United States Attorney Blasingame to reveal information obtained in the course of the post-arrest interview. In petitioner's view the statements made to Blasingame were a part of plea bargaining discussions (Pet. 13-15, 18-25) and as such were inadmissible under Rule 11(e)(6), Fed. R. Crim. P. Moreover, petitioner claims (Pet. 15-18) that, irrespective of the reach of Rule 11(e)(6), his statements to Blasingame should not have been admitted—even in rebuttal—because Blasingame had, in effect, promised not to use statements made by petitioner at the conference against him at trial. Neither of these claims warrants review by this Court.

1. Although petitioner now characterizes his interview with Blasingame as a plea bargaining session, petitioner testified otherwise at trial, where he stated, outside the presence of the jury, that he never intended to plead guilty (Tr. 727-728):

THE COURT:	Were you going to plead guilty?
THE WITNESS:	Pardon?
THE COURT:	Were you going to plead guilty then?

THE WITNESS:	He mentioned something about pleading and I said I didn't want to because I felt I was innocent of the charges in my case. I would work out and cooperate, but not by pleading guilty.
THE COURT:	You were going to trial?
THE WITNESS:	Right.
THE COURT:	You were going to go to trial, but he was going to get the Judge to let you off?
THE WITNESS:	He was going to talk to the Judge about it.
THE COURT:	About what?
THE WITNESS:	About dropping the charges. I told him that I wouldn't plead guilty, that they would have to drop the charges altogether, and he said he would have to talk to the Judge, and that he couldn't promise me that himself.

By contrast, Blasingame described his conference with petitioner as merely "a preliminary meeting to find out what sort of things he could offer and what sort of investigation would go from there" (Tr. 740). Blasingame denied that any promises were made to petitioner. Asked if there was any discussion regarding the dropping of charges, Blasingame replied, "Not to my recollection" (Tr. 742).

With the situation in that posture, the en banc court correctly concluded that petitioner's statements to Blasingame could not fairly be described as "statement[s] made in connection with, and relevant to," a plea of guilty or an offer to plead guilty. Rule 11(e)(6), which prohibits

the use of such plea-related statements, was intended to encompass only those statements made in connection with fairly formal plea bargaining. 2 *Weinstein's Evidence* para. 410[07], at 410-40 to 410-41 (1977). See also *United States* v. *Stirling*, 571 F. 2d 708, 730-732 (2d Cir.), cert. denied, Nos. 77-1612 and 77-1761 (Oct. 2, 1978).[4] Otherwise, almost any instance of post-arrest voluntary self-incrimination would be subject to a claim of use immunity under Rule 11(e)(6).

An arrestee who cooperates with law enforcement officials obviously hopes to help his own cause, regardless of whether promises of leniency have been tendered in exchange for his cooperation. Yet if any statement made by a cooperating arrestee is deemed to constitute an effort to engage in plea bargaining, then Rule 11(e)(6) will be given a scope far beyond the salutary purpose it was intended to serve: to encourage free and frank plea discussions. Instead, the purpose of Rule 11(e)(6) is best served if the defendant is required in some fashion to manifest his intention to engage in plea negotiations before he makes voluntary admissions. *United States* v. *Levy*, 578 F. 2d 896, 901 (2d Cir. 1978). As the record

[4]The Advisory Committee on the Criminal Rules has proposed an amendment to Fed. R. Crim. P. 11(e)(6) to make it clear that the Rule does not apply to voluntary admissions to law enforcement officers made in the hope of obtaining leniency. See Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* 22-24 (1978). That amendment was proposed in light of the Fifth Circuit's previous decision in *United States* v. *Herman*, 544 F. 2d 791 (5th Cir. 1977), where the court gave a very broad construction to Rule 11(e)(6). In the instant case and in the companion case of *United States* v. *Robertson*, 582 F. 2d 1356 (5th Cir. 1978), the court limited the reach of *Herman* in a manner consistent with the language and purpose of Rule 11(e)(6) and the proposed amendment to that rule.

shows, that was not the situation when petitioner conferred with Blasingame. See *United States* v. *Arroyo-Angulo*, 580 F. 2d 1137, 1147-1149 (2d Cir.), cert. denied, No. 78-5172 (Oct. 16, 1978).[5]

To the extent that petitioner contends that he was, in fact, engaged in plea bargaining, his contention constitutes only a disagreement over a factual issue resolved against him by the district court and the en banc court of appeals. This case is therefore not at all comparable to *United States* v. *Smith*, 525 F. 2d 1017 (10th Cir. 1975), on which petitioner relies, for in that case the court of appeals noted that there was no question but that the conversation at issue "was in the nature of plea bargaining" (*id.* at 1019 n.1).

2. Petitioner also contends that Blasingame made an unqualified promise that petitioner's statements would not be used against him at trial. Yet, as the en banc court observed, there is a substantial and unresolved factual question as to what Blasingame promised petitioner with respect to the discussions in the conference. Blasingame testified that he told petitioner they would not discuss this case. The district court credited that testimony, but added that "it was impliedly agreed that the statements made by him, disclosure of the information he gave would not be used in this case" (Tr. 778). The en banc court characterized the agreement as either "a promise

[5]Privileges such as the attorney-client privilege or the plea bargaining privilege found in Rule 11(e)(6) serve their purposes only to the extent that the individual is aware of and relies on the privilege in making a particular disclosure. If the individual speaks without intending to rely on the privilege, the exclusion of the evidence imposes costs without promoting any countervailing benefits in the way of encouraging disclosures that would not be made in the absence of the privilege. For that reason, the privilege of Rule 11(e)(6) should be limited to fairly formal plea bargaining, where it may be anticipated that the defendant will make full disclosure in reliance upon the shelter of the privilege.

that nothing said would be used against him" or "a commitment that his pending case would not be discussed" (Pet. App. B-2).

Even if petitioner's version of the facts is accepted, any "agreement" not to use petitioner's statements against him at trial should not be expansively construed to mean that petitioner would be free to present inconsistent testimony at trial without being subject to contradiction based on his pretrial statements. And even if the agreement is given that broad construction, it should not be enforced in a manner that would deny the jury the opportunity to consider the impeachment value of prior statements by petitioner that were squarely contrary to his testimony at trial. Compare *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954).[6]

In sum, petitioner's claims turn in large measure on the unusual facts presented here. And even if those facts were resolved in petitioner's favor, his claims, examined in context, presents no substantial question of law calling for review by this Court.

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[6]In any event, Blasingame's rebuttal testimony about petitioner's dealings with Alvarez was cumulative to rebuttal testimony presented by two co-conspirators (Tr. 977-979, 1030-1032). In addition, there was at trial other testimony, directed at petitioner's predisposition or challenging his credibility, that was unaffected by the statements in question, such as evidence that petitioner had sold and used drugs (Tr. 974-975, 1030). In light of these considerations, the error, if any, in the admission of Blasingame's testimony was harmless. See *United States* v. *Levy*, *supra*, 578 F. 2d at 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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